Office-Supreme Court, U.S.
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SEP 28 1984
ALEXANDER L. STEVAS
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(2)

Case No. 84-354

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALPHONZ LENGYEL,

Petitioner,

v.

BOARD OF REGENTS OF
NORTHERN KENTUCKY UNIVERSITY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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24 pp

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QUESTION PRESENTED FOR REVIEW

Under the causation test in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274, has the employer met its burden of proof if the Court finds that a non-tenured teacher who was given a notice of non-renewal after engaging in Constitutionally protected conduct which was a motivating factor in his non-renewal, would have been non-renewed for the next immediate school year, based upon his unprotected conduct that occurred before the date of the teacher's non-renewal?

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STATEMENT OF THE CASE

I. THE NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW.

With one exception, Petitioner's statements are accurate. Petitioner states that the lower Court ruled that "NKU would ultimately have terminated" the Petitioner. The word "ultimately" is not found in the District Court's Opinion, as the District Court specifically found that NKU would have decided not to rehire Petitioner for the next immediate academic year (1977-1978).

II. THE FACTS.

Respondents do not accept the factual description of the Petitioner (hereinafter referred to as "Lengyel");

while many of his assertions may be found in the record in an isolated form, his selection of facts do not fully state the case.

Dr. Lengyel did indeed come to Northern Kentucky University from Wayne State University, where he was not successful in obtaining tenure. During his second and third years of employment at Northern Kentucky University (hereinafter referred to as "NKU"), he did receive salary raises, but they were nothing more than the ordinary raises granted with a general across-the-board increase.

At page 4 of his Petition, Lengyel states that there was considerable, and conflicting, testimony as to the reason for his January, 1974 transfer to the Department of Social Sciences. At page 5 of the Petition, Lengyel attempts to characterize that testimony as essentially involving professional disagreements between Lengyel, and his department Chairman, Dr. Bill Parsons. Even the following limited description of Lengyel's disruptive behavior over the course of time will show that the finding of the District Court, that these were primarily personal disputes with colleagues, is supported by the evidence.

1. At pages 4 and 5 of the Petition, the Petitioner criticizes the Court of Appeals' statements in regard to the Art Coordinator issue. Petitioner's assertions require some elaboration.

The Chairman of the Department of Fine Arts, to whom Lengyel was subordinate, was Dr. Bill Parsons. While Lengyel and Parsons had had some difficulties from the beginning, the first substantial conflict came in the fall of 1973 when Lengyel returned to the campus. Parsons had appointed coordinators for the various disciplines in his

Department so that he would not be besieged by requests from the numerous individual teachers. He appointed the Respondent Jowaisis as the Coordinator of Art. Lengyel objected vigorously, claiming that it was insulting to have to report through Jowaisis and demanding permission to deal directly with Parsons. When Parsons refused to do that, because it would constitute preferential treatment over the other educators, Lengyel went to the President (Steeley) and Academic Vice-President (the Respondent Tesseneer) and persuaded them to request Parsons to deal directly with Lengyel. Lengyel had created such intense turmoil over this issue in the Department that Jowaisis and all the other artists came to Parsons complaining about it, but in an attempt to restore some peace and harmony within the Department, Parsons acquiesed to the request of his superiors to accede to Lengyel's demand. As a result, Jowaisis accused Parsons of treating Lengyel in a preferential fashion and resigned.

Lengyel readily admitted that he kept pursuing Parsons about not reporting through the Art Coordinator and he asserted it was a violation of his First Amendment rights when people complained about his offering "to teach young colleagues to teach properly".

At that point, Parsons was even considering resigning himself; Lengyel had created such turmoil and confusion in the Art Department during the entire fall of 1973 that on October 10, 1973, Parsons prepared a letter of resignation, which he then carried in his pocket for a period of time. He wanted support from the Administration, and he was not getting it.

2. Lengyel went over Parsons' head in attempts to get Art History and Archeology removed from the Fine Arts Department and Parsons complained to Steeley about that.

On many occasions, Lengyel pressed for his programs to be separate from studio art, programs to be under his personal direction, all of which was obviously designed to create a small, separate fiefdom for Lengyel.

3. On page 4 of the Petition, Petitioner characterizes the "incorrect degree" issue as merely being a blow to Parsons' professional pride. However, the issue was never that. After Lengyel arrived on campus, he contended that the existing Bachelor of Fine Arts program was worthless and that a Bachelor of Arts program was the only appropriate degree to award. Parsons never refused to offer the BA program at the proper time and favorable consideration was being given to that very idea. However, that was not good enough for Lengyel, who began accusing Parsons of obstructing plans for such a degree. This illustrated, as was shown in other testimony, that any time Lengyel's demands were not accepted, he became disruptive about it; he even acknowledged at trial that he told students that Parsons had made an unprofessional mistake in regard to the proper degree.

4. Lengyel further demonstrated his insubordination by his consistent refusal to operate through ordinary channels; for example, difficulties occurred between Parsons and Lengyel as to financial matters, in which Lengyel insisted on going directly to the Business Office instead of dealing with Parsons, despite Parsons' repeated requests.

5. Shortly after his arrival at NKU, Lengyel told Parsons, his Department Chairman, that Parsons was not preparing his courses properly and should better himself.

6. Lengyel made unrealistic demands for space in the planning of the new Fine Arts Building, including space

for twelve art historians and staff. On numerous occasions, Lengyel asserted that Parsons had made mistakes in the design of the building. Dr. Parsons testified that Lengyel's demands were so unrealistic that at one point the architect walked out of the meeting.

He appeared to other faculty members to be unreasonable concerning the design of the newly planned building. He frequently postured himself as being the sole authority on areas such as how to build the Fine Arts Building.

7. Witnesses testified about instances at Departmental meetings in which they felt uncomfortable with Lengyel's actions, involving disruptions of those meetings. Dr. Parsons testified that at Departmental meetings, he would have several items that needed to be discussed, but Lengyel would insist on raising unscheduled issues and would filabuster, refusing to talk about anything else. If Parsons called something excellent, Lengyel would demand to know why he had not called it superb. Lengyel would demand to know why Parsons had not immediately put in effect a program that Lengyel wanted. After Lengyel would go on and on for a period of time, Parsons would try to stop him by reasoning and that would not work; ignoring him did not work; outshouting him did not work.[1]

Business could not be conducted, and meetings would simply break up because all the time would be spent talking about Lengyel's private concerns; Lengyel admitted that it was his tactic to bring constant pressure on Parsons because he felt it his duty to do so. He asserted that only his conscience was the limit of his criticism, and that if

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[1] To which latter statement Dr. Lengyel replied "You never outshout me", a point which had to be conceded by Dr. Parsons.

Parsons did not respond to one proposal, Lengyel would give him another, and another. He was largely successful in this tactic and usually got to teach what he wanted.

* * *

In the opinion of Dr. Tesseneer, the Vice President, things "got out of hand" by the fall of 1973 and spring of 1974.

In the Fall of 1973, Parsons began asking repeatedly that Lengyel be given a notice of non-reappointment. On January 21, 1974, Parsons advised Steeley and Tesseneer that in his opinion Lengyel had acted unethically and unprofessionally, reason enough for dismissal in most institutions; nonetheless, Parsons was willing that he stay but wanted him to be under Parsons' control.

In view of the continued difficulties between Parsons and Lengyel, and in spite of other faculty members' substantiation of Parsons' complaints, President Steeley (who was not sued by Lengyel) decided to have Lengyel transferred to the History Department for immediate supervisory purposes; that transfer was for one purpose only, to separate Parsons and Lengyel. When Steeley discussed the idea with the Respondent Wallace, the then Chairman of the History Department, Wallace was concerned about the tenure status of the people already in his department. At his request, Steeley and Lengyel went to a meeting of some or all the history faculty members and advised them that Dr. Lengyel was *not* to be part of the History Department for purposes of tenure and promotion. The understanding and the agreement at the time of the transfer was that for purposes of class scheduling and physical location of classrooms and offices, Lengyel would remain in the area of the Fine Arts Department. The transfer was effected, but unfortunately did not work.

It is not surprising that Lengyel does not believe Steeley, Tesseneer and Parsons when they say it was concluded in early May, 1975, that he should be non-renewed, as it does not correspond with his present view of reality. He contends that the change of his contract to a twelve month basis, which he depicts at page 5 of the Petition as a substantial salary raise, and an increase in budget for the 1975 summer dig, proves that Lengyel was well loved by all at that period of time. Nothing could be further from the truth.

The contract status was changed from nine months to twelve months in order to provide income to Lengyel for the summer during the 1975 dig. His preceding year's contract had been for the academic year and the new contract was for the fiscal year with a salary somewhat higher in order to compensate for the summer work, the difference being $3,500. Parsons answers his contentions that he was granted huge amounts of money as a result for his good service by pointing out that his salary was only increased 5.5% and by 15% for being transferred from an academic year to a fiscal year contract.

Dr. Steeley testified that after Lengyel's transfer to the History Department, Parsons and Lengyel continued to have difficulties; by February 19, 1975, Lengyel was claiming that Parsons was refusing to provide the money Lengyel wanted for the 1975 summer dig. Dr. Parsons responded to that charge by letter of February 26, 1975, which made it clear to Steeley that the situation between Parsons and Lengyel had become even worse. Documentary evidence dated February 26, 1975, clearly shows that Dr. Parsons was again demanding Lengyel's non-renewal and that Parsons was justifiably outraged at the accusation by Lengyel that he had spent more money on a play by an East German communist than for Lengyel's arch-

ological projects, which was not true. Steeley considered this an attack on Parsons by innuendo, and felt Lengyel's berating of his Chairman and other department members was unprofessional. Steeley concluded that the transfer to the History Department was not being successful; about this same time, Parsons tried to resign his Chairmanship because of those continuing difficulties with Lengyel, but Steeley and Tesseneer persuaded him not to do so.

Dr. Steeley became very frustrated about the 1975 summer dig funding episode, and his attitude toward Lengyel changed. After he had personally negotiated Lengyel's demands of $8,970 down to $5,000, he turned the matter over to Dr. Tesseneer to finalize the paperwork; when Tesseneer reported back to Steeley, Steeley found that Lengyel had insisted on $5,500, to which Tesseneer had agreed. (As Dr. Wallace stated in a memorandum introduced into evidence, Lengyel regularly gave different versions of his budget to different persons.) He authorized Tesseneer to grant that amount of money but he had become so exasperated with Lengyel and his continual efforts to achieve his own ends that he told Parsons and Tesseneer that he was bowing out of the situation and would defer to the judgment of the Department. He decided that if non-renewal was the desire of the Department, he was not going to oppose that desire anymore.

It was around May 8, 1975, that Tesseneer and Parsons met with Steeley, at which time Steeley told them that he would no longer prevent them from giving Lengyel a notice of non-reappointment. The three of them discussed putting Lengyel back in the Fine Arts Department when he returned from the summer dig, which would have been late August. They decided that they would not issue the non-renewal notice immediately for

two reasons: first, Lengyel had requested the tenure committee to reconsider his case so his tenure application was still pending and they did not think it proper to give a notice at that time; second, they felt that Lengyel would create turmoil even in Europe.

We referred above to Lengyel's *present* view of reality not allowing him to accept NKU's explanation; his view of reality on February 19, 1975, was quite different. On that date, he wrote Steeley a letter, which was admitted into evidence, complaining about Parsons' funding of a "demoralizing" play by a communist, and asking that Steeley take immediate action to support Lengyel, concluding his letter:

> "I trust that your sound judgment will, *as it has in the past,* prevail over the short-sighted views of your subordinates." (Emphasis added.)

Tesseneer had already made up his mind that Lengyel should be non-renewed. In early May, 1975 he and Lengyel met, and the meeting consisted (as Lengyel put it) of a loud conversation. Tesseneer described the final days as follows. He said he just did not want to accept the fact that Parsons was having problems with Lengyel. Even though Parsons had given up, Tesseneer had not. However, Parsons was not making the progress they wanted in the Department, and Tesseneer thought it might be Parsons' fault. He went to Lengyel's office where Lengyel went through a tirade for an hour and a half, while Tesseneer tried to explain that everything could not be Lengyel's way in the Department. Dr. Parsons was invited in and Lengyel became even more incensed. It became apparent to Tesseneer that the Department simply could not work with Lengyel.

Lengyel was incensed because Parsons, as Chairman of the Fine Arts Department, was not blindly accepting his demands. Lengyel accused Parsons of ignorance and of ignoring his requests. The Respondent Storm described his major recollection of Lengyel as being five or six years of constant complaints. All of these events occurred prior to Lengyel's testimony in the Tihany matter on the 15th of May, 1975.

Lengyel's tenure application was in fact denied on July 1, 1975, and his earlier tenure hearing is another illustration of his general pattern of conduct. The Respondent Corbin served on the Faculty Board of Review, designed to give a peer review in the event that a Chairman and teacher disagreed over a tenure application. In the spring of 1975, Lengyel had instituted his own tenure application and had requested a hearing before the committee. Lengyel attended only one meeting prior to his summer departure and it was an utter disaster; the committee was in the process of asking Lengyel some questions connected to the tenure application when he suddenly lost control of himself, became angry and left the room. There had been no exhibition of any animosity toward him by any member of the committee, but Lengyel began saying that it was important that he stay at NKU and that he was an international scholar; he became quite distraught. Nobody asked him to leave, but he simply got up and left. On the first of July, 1975, Dr. Tesseneer was advised of the committee's decision recommending against tenure for Dr. Lengyel. The non-tenure decision was reached because of Lengyel's qualifications. Lengyel conceded that he was angry; he seemed to feel that the committee wanted to await the outcome of his non-reappointment case, but Dr. Corbin did not recall that to be the situation. Corbin advised Lengyel if he had additional documentation that

the committee had not had at the spring meeting, they would be glad to review it and if substantive enough, they could reopen for another meeting. Information was sent by Lengyel, but the committee felt it not to be of such nature as required another meeting.[2]

Lengyel contends that the three man committee was never rescheduled by Tesseneer, but it was not requested until Dr. Albright, the new President, arrived.

At page 8 of his Petition, Lengyel characterizes Steeley's resignation as being "in the face of mounting pressures as a result of charges" supposedly made by Lengyel, but the record does not bear out that conclusion. Moreover, it should be noted that Steeley was never made a party to this lawsuit.

While Lengyel asserts that his appeals lay dormant until late August of 1976, that is because he was awaiting the arrival of the new President, and as soon as Dr. Albright arrived, Lengyel began asking his aid. On August 24, 1976, Lengyel wrote Dr. Albright requesting a change in the decision. Albright wrote Lengyel on September 15, 1976, inquiring of Lengyel as to whether he desired a hearing. Lengyel wrote Albright saying that he would leave it up to Albright as to whether there should be a hearing or not. At that point, Dr. Albright issued instructions to Dr. Corbin to have a hearing. Dr. Albright's instructions to that committee were "to examine all of the case, all of the material, the evidence and so on".

Assertions that Albright was "dissatisfied" with the faculty body's report are conclusions without factual basis.

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[2] On November 11, 1975, Lengyel was advised that the committee had decided to continue in its opinion that tenure not be recommended.

Equally, there is no evidence that the faculty body was "refusing" to be more specific.

When the hearing committee composed of three persons (the one Dr. Tesseneer allegedly refused to continue in view of the presence of the attorneys) was recreated, it turned out that two of the three people on that committee were personally selected by Lengyel and he had no objection to the third party. It was this group that criticized the faculty body report, but even this handpicked group agreed that the *Faculty Body* was supposed to be the group to consider Lengyel s case. Dr. Pinello, the Chairman of the three person committee, readily admitted that his committee was advisory only in nature. He also agreed that the committee had concluded there was no violation of the "letter of the law" and by "letter of the law" the committee meant the Faculty Handbook. Pinello conceded that it was important in a review system that the review be by people who know the faculty member and he came away from the meeting with the impression that Lengyel was not well-liked by his department.

Lengyel implies that reasons for his non-renewal should have been broadcast. However, because of legal principles well known in Academia, and not for fear of the reasons, Dr. Parsons made it clear that he did not want the discussion of the case to be made public unless Lengyel himself made it public, which he finally did at his hearing before the Board of Regents.

ARGUMENT AGAINST ALLOWANCE OF THE WRIT

The decisions of the Courts below are fully in accord with the principles established in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). Rather, it is the Petitioner who miscontrues *Mt. Healthy,* which is made apparent by an assembly of the various assertions made in the Petition regarding the supposed requirements laid down in that case. The Petitioner erroneously claims that *Mt. Healthy* requires:

1. That not only must both permissible and non-permissible reasons for the termination exist, they must be articulated at the time of termination, and at no later date;
2. That the Court must specifically find that the sole motivation and cause for the employer's action was the permissible reasons; and,
3. That if permissible and non-permissible reasons are intertwined, the employee must prevail.

Analysis of these claims show them to be without foundation.

1. *Mt Healthy* requires that the employer be given an opportunity to demonstrate that the employee would not have been rehired even if he had not engaged in the protected conduct. While the employer must prove this by a preponderance of the evidence, *Mt. Healthy* does not require a finding that reasons for the non-renewal were articulated at the time of the non-renewal.

As a Constitutional matter, reasons do not have to be advanced at all. A non-renewal can be for any reason (so long as it is not Constitutionally impermissible) or no

reason. It is only when the teacher has tenure or he is being terminated "for cause" that he is entitled to a statement of reasons at that time. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 37 L.Ed.2d 548 (1972); *Wells* v. *Board of Regents of Murray State University*, 545 F.2d 15 (6th Cir. 1976). *Mt. Healthy* does not change these rules. Consequently, there was no need for NKU to distinguish between First Amendment and non-First Amendment reasons at the time of non-renewal, or to advance them at all.

Petitioner demands that the context of the *Mt. Healthy* fact situation be considered and it is that very factual background that defeats his claim that the District Court misconstrued *Mt. Healthy*. When Doyle's superintendent made his recommendation he advanced no reasons (contrary to the implication of the Petitioner). When the Board accepted that recommendation, no reasons were being given. It was only later, after Doyle requested a statement of reasons, that any reasons were given. Thus, when the Board adopted the superintendent's recommendation and terminated Doyle, no reasons whatsover had been given. This being the factual context behind *Mt. Healthy* Petitioner's arguments are meritless.

It should be noted that several hearings by several committees were granted Lengyel, during which it was made very apparent what the "reasons" were for his non-renewal. The Board of Regents had Lengyel before it on May 23, 1977, and used those reasons in its decision. Thus, even if reasons are required as asserted by Petitioner, when the final decision by the Board was made, there *were* permissible reasons available.

2. The argument that protected conduct must have played no role is not supportable. In *Mt. Healthy*, the

Supreme Court stressed that an employee should not be able to prevent his employer from reaching a decision not to rehire on the basis of the general record, simply because protected conduct makes the employer more certain of the correctness of its decision. *Mt. Healthy, supra,* at 575. Until Doyle made his telephone call to the local radio station, no action to terminate his employment had been taken, and it was manifestly that action which precipitated his termination, based upon his previous history and the protected speech episodes. It is very apparent what the Supreme Court meant when it refused to preclude the Board ". . . because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct, Doyle's record was such that he would not have been rehired in any event." *Mt. Healthy, supra,* at 575. The footnote from *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977), quoted at page 19 of the Petition, is further authority for a rejection of the sole motivation test being glossed onto *Mt. Healthy* by the Petitioner. In that footnote, the Court stated that proof that the decision was motivated *in part* by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision.

3. *Mt. Healthy* contains no requirement that the employee must prevail if permissible and non-permissible reasons are intertwined. This notion on the Petitioner's part springs solely from the Petitioner's out of context quotation of footnote 14 from *Wright Line, A Division of Wright Line, Inc. and Bernard Lamoureux,* 251 NLRB 1083 (1980).

By accepting his own major premise (that the District

Court "speculated"), the Petitioner is able to create out of whole cloth an issue of potential misapplication of *Mt. Healthy* in labor cases. No such misapplication will occur. There was no speculation on the part of the District Court, and because of the peculiar nature of teacher non-renewal requirements, labor cases are best left to their own facts for application of *Mt. Healthy,* rather than have *Mt. Healthy* construed (for labor law purposes) in an educator's case.

Lengyel's criticism of the District Court in its use of the word "would" is entirely unfounded, that being the very verbiage of the Supreme Court. That verbiage is particularly apposite in teacher non-renewal cases. Commonly, non-tenured teachers are to be given notice by some recognizable date that their contracts are not going to be renewed; this facilitates their seeking other employment at their relative leisure and while the notice might come at the very end of the allowed period, there is no Constitutional prohibition against giving a teacher earlier notice. Contrary to the Petitioner's argument at page 20 of the Petition, a teacher does not have a Constitutional right to a last minute notice so that all of his behavior up to the minute may be considered.

During his contractual period, an untenured teacher can typically be immediately terminated only for specified causes, and even in that regard a teacher and an assembly line operator are not the same. Moreover, they have fundamentally different legal employment relationships, the teacher being hired for a limited, but specific, term and the ordinary worker being hired for a vague, open ended period. Either is subject to termination at the whim (assuming it is a Constitutionally permissible whim) of the employer. However, the factory worker can be dis-

charged immediately, whereas the teacher may well be able to hold his job for nearly another year. Thus, it is not speculation for a Court to consider a teacher's record and conclude that at some point during the non-renewal period the non-renewal would be issued.

CONCLUSION

While the Petitioner claims that a review of this case is required by some supposed misapplication of *Mt. Healthy* principles, what he really seeks is a review of *Mt. Healthy* itself. The Petitioner had more than adequate review of his case by numerous committees, the NKU Board of Regents, the United States District Court and the Sixth Circuit Court of Appeals. To equate his proper defeats with Communist persecution is typical of the self-righteous claims made by Lengyel throughout his time at NKU; in his view, only *his* rights are worthy of protection. But the Respondents also had a right to be free from Lengyel's persecution, and the Courts below properly balanced the parties' respective rights.

Respectfully submitted,

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